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No. 90-1438

In The

Supreme Court of the United States

October Term, 1990

VICTOR KRAMER,

Petitioner,

vs.

JOHN RAVELLA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT

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I. INTRODUCTION

Petitioner, Victor Kramer, seeks review of an order which, he contends, confounds the outer reaches of constitutionally permissible state court process by sanctioning him for failures that he claims were the product of excusable inattention to detail or which he was powerless to avoid. Seeking the solicitude often afforded to litigants attempting to act as their own counsel, petitioner paints a picture of an individual unfairly victimized by an overreaching opponent and beset by a vindictive state court system indifferent to the most minimal requirements of due process.

The reality is very different. Far from presenting a case meriting the attention of this Court or demonstrating

a need to impose federal superintendency of state discovery proceedings, the courts below correctly concluded that the facts of this case demonstrate an attempt by petitioner to frustrate the judicial process, thus meriting a strong response. *See National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1975).

This petition is of a piece with that strategy. It was filed only after respondent commenced efforts to collect on his judgment in Australia, where the pendency of this petition has been invoked (thus far successfully) to delay execution proceedings. It asserts claims that were not even mentioned by Mr. Kramer in the trial court or on appeal and succeeds in creating even a colorable claim only by distorting the record below beyond recognition.

Respondent submits that this case involves no more than an understandable and appropriate judicial response to the specific facts of this case, which reflect the efforts of a well-to-do and sophisticated businessman to frustrate the litigation process. Contrary to petitioner's flattering self-portrait, the California courts that experienced first-hand the series of skillful maneuvers engaged in by petitioner (and his various on-again-off-again lawyers) fairly characterized petitioner as a "manipulator of the system" (Reporter's Transcript on Appeal, hereinafter "RT," 14/10-14), engaged in a "catch me if you can" approach to the judicial process. There is no need, and no basis, for review of those conclusions by this Court.

II. RESPONDENT'S STATEMENT OF THE CASE

In January 1987, respondent Ravella filed suit against petitioner Kramer, the purported vice president of a corporation named Microport Systems, Inc., seeking damages for Kramer's fraud in connection with a stock subscription agreement through which Ravella hoped to acquire a five percent interest in Microport [Clerk's Transcript on Appeal, hereinafter "CT," 1-17]. In late 1987, Ravella propounded a request for production of documents to Kramer [CT 70-75]. Because Kramer recently had moved to Australia, ostensibly for personal reasons unrelated to this lawsuit, his counsel sought and were granted several extensions of time to allow them to contact Kramer and prepare a response to the discovery request [CT 68/16-17].

It soon became clear, however, that Kramer had no intention of participating in this litigation. He failed to communicate even with his own attorneys, who ultimately sought (and were granted) leave to withdraw [CT 49-55, 80-81]. He also failed to respond at all to Ravella's discovery requests [CT 42/7-21]. Ravella therefore moved for an order compelling Kramer to respond to the outstanding document request by filing a verified pleading identifying under oath responsive documents and producing any such non-privileged documents in his possession or control [CT 61-66]. The court granted Ravella's motion [CT 120, 121-122]. Moreover, because Kramer's previous conduct suggested a refusal to participate responsibly in the litigation, the court's order further provided for the entry of Kramer's default if he still failed to file the statutorily mandated response [Id.].

At this point, Kramer, now acting *in pro per*, sent a handwritten letter to Ravella's attorneys and the court claiming that he could not find some of the responsive documents, that he did not have others, and that the requests, in all events, were objectionable on numerous grounds [CT 291-294]. Kramer's response was not made under oath, as required, and did not contain a declaration that he had made a diligent search for responsive documents. He also did not identify the documents which admittedly were in his possession and failed to produce a single piece of paper (circumstances which persist until today) [Id.].

Ravella's attorneys informed Kramer that his response failed to comply with the court's order and that entry of his default therefore would be sought [CT 296]. However, Kramer made no attempt to improve on his response and his default was entered [CT 145-146].

In accordance with California procedure, Ravella then moved to have the default entered as a judgment, a separate step requiring yet another noticed hearing. Kramer filed no opposition to Ravella's motion. He did, however, retain new counsel who appeared at the hearing but did not oppose the motion [CT 349/8-15]. Several more months then elapsed before Kramer's new counsel moved to set aside the default [CT 266-277]. That motion was denied by a different judge who, having reviewed the record, noted with frustration that Kramer had repeatedly played games with the judicial process and appeared to be simply a "manipulator of the system" [RT 14/1-14].

Kramer did not argue at any point in the trial court that the default judgment against him allegedly violated this Court's decision in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1908), or that his due process rights were violated by the court's supposed failure to "warn" him that his default might be entered for failing to produce documents as well as for failing to respond in the manner required by law. Nor were those contentions raised by Kramer in his unsuccessful appeal, in which the court of appeal concluded that the trial court had acted well within its discretion in light of a record which reflected a defendant who "appears to have simply walked away from his attorneys and this lawsuit after filing an answer [and whose] attitude towards plaintiffs appears to have been 'catch me if you can' " [Petition for Writ of Certiorari ("PWC"), A-11].

After Kramer's appeal was rejected, he employed yet another law firm to petition the California Supreme Court for review. That petition – in addition to claiming, again, that the trial court had abused its discretion – *for the first time* alleged that Kramer's federal due process rights had been violated by the default judgment sanction. The California Supreme Court denied his petition.

To support his belated due process claim, Kramer's instant petition emphasizes his – still unverified – assertion that he "did not have the bulk of the documents demanded of him," and that no contrary showing was made prior to entry of his default [PWC 5]. But whether Kramer in fact had the documents which he claimed he did not have is immaterial. Kramer's default was not entered for his failure to produce unavailable documents, but for his failure to identify, in a verified pleading, the

documents which he did have and for his failure to produce *those* documents. The California courts found no defect in the evidence on these points and confirmed that Kramer was capable of complying with the verification and identification requirements of the order, but simply neglected to do so without acceptable excuse [RT 13/18-14/14; PWC A-10 – A-12].

III. REASONS FOR DENYING THE WRIT

A. Petitioner Failed to Properly Raise and Preserve His Constitutional Claims in the Courts Below.

As a threshold matter, petitioner has failed to raise his asserted "federal" questions in a manner sufficient to invoke this Court's jurisdiction under 28 U.S.C. §1257. *Cardinale v. Louisiana*, 394 U.S. 437 (1968). Despite the clear command of Supreme Court Rule 21.1(h), petitioner refers this Court to no portion of the proceedings in "the court of first instance" in which the questions presented by his petition were even purportedly raised. As for the court of appeal, petitioner cites only to a single page of his brief on appeal where the federal issues supposedly were framed [PWC 6]. However, upon examination, that reference consists of a single sentence offering no more than a generalized observation about the need for "adherence to" this Court's "precedent concerning the circumstances in which imposition of [a default] sanction is warranted." [Opening Brief of Appellant, hereinafter "AOB," 12].

In fact, contrary to petitioner's assertions in his instant petition, he expressly advised the California appellate court that his appeal

> present[ed] a single issue for determination: Did the court abuse its discretion in imposing the ultimate sanction of a default judgment . . . under [California] Code of Civil Procedure Section 2031 . . . [AOB 1].

Consistent with that articulation, petitioner failed to discuss either *Hammond Packing* or his asserted "absence of notice" due process claim, although those are the issues upon which review is now sought by this Court.[1] As a predicate for invoking this Court's certiorari jurisdiction, that record falls well short of the mark. *Cardinale v. Louisiana*, 394 U.S. at 439.

B. Kramer Was Not Sanctioned for Failure to Take Actions That Were Beyond His Power.

Kramer's "*Hammond Packing*" argument rests on the premise that he was sanctioned for failure to produce documents which were never shown to have been in his possession. But that was *not* the basis for the default sanction. Although it is true that Kramer "disobeyed a judicial discovery order to identify and produce documents," his default was entered because he failed to

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[1] Given this history, it is hardly surprising that those issues were not addressed by the court of appeal, or that the California Supreme Court declined to review those claims when first presented in Mr. Kramer's petition for hearing by that court.

submit the required pleading identifying those responsive documents that were in his possession and verifying his assertion that certain documents were not. The record below discussed these matters in much detail [RT 3/9-18, 7/23 – 8/17, 10/4-8, 13/18 – 14/14; AOB A-7 – A-8, A-11 – A-12]. The trial court rejected Kramer's excuse that the term "verified" meant nothing to him [RT 13/18-26], and explicitly found that compliance with the requirements of its order was well within Kramer's power. Further, referring to Kramer's history of evasion, the trial judge who passed upon Kramer's motion to set aside the default observed:

> Taking all of [defendant's] actions or perhaps inactions into consideration and looking at the history of this case and the efforts that plaintiffs have made to get this matter tried, and on virtually every level, and at every point they have been frustrated in their ability to do so by a person who claims that he doesn't know what 'verified' means and the compliance of or lack of compliance with orders . . . He had a chance to get lawyers. I would venture to say he's probably retained lawyers with some frequency over his life, and to no small extent I see him as a manipulator of the system . . . [RT 13/19-14/13].

The presumption that a refusal to provide discovery is "an admission of the want of merit in the asserted defense" does not arise only upon the failure to produce documents. The presumption is equally appropriate where a litigant fails to answer interrogatories, *National Hockey League v. Metropolitan Hockey Club, supra*, 427 U.S. 639, or, as here, fails to verify his assertion that critical documents are not in his possession.

Kramer argues for a new standard which would – as a matter of federal constitutional mandate – permit state courts to impose a default sanction for discovery abuse only "when the specific discovery resisted by the defendant support[s] the inference that he in fact admitted the relevant claim against him" [PWC 8]. But no such qualification is required by the Fourteenth Amendment. Sanctions for failure to comply with court orders, including those compelling discovery, are consistent with due process requirements so long as the litigant was able to comply with the order. *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 763 (1979); *National Hockey League v. Metropolitan Hockey Club, supra,* 427 U.S. 639. The presumption of a meritless defense arises from the calculated refusal to provide discovery regardless of whether that discovery would in fact have contained the proof that the defense lacked merit.

It is particularly inappropriate for the Court to circumscribe the discretion of state trial courts to establish appropriate rules for the conduct of litigation in matters pending before them. This Court has recognized that federal trial judges must have the power to control litigation abuse both as a matter of protecting orderly judicial process and as a deterrent to future abuse. *See, e.g., Chambers v. NASCO,* 1991 WL 92981 (1991); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.,* 59 U.S.L.W. 4144 (1991); *National Hockey League v. Metropolitan Hockey Club, supra,* 427 U.S. 639. *A fortiori* even greater deference should be given to the processes of state courts.

The ability to control the conduct of litigation is uniquely dependent upon the ability of the trial court – which will be most familiar with the entire course of the

proceedings – to exercise its discretion in light of the overall record and the interests of effective judicial administration. While there are, of course, due process limits upon that power, the circumstances of this case do not present a serious issue regarding those limits. Nor is this an appropriate case for this Court to consider the extent of state judicial authority over discovery abuse, particularly in light of petitioner's failure even to provide the state courts with an opportunity to address the alleged due process issues in this case by raising his federal claims in a timely manner in the trial court (or the court of appeal).

C. No Procedural Due Process Claim Arises from the Facts of This Case.

Petitioner additionally postulates a violation of his due process rights so "obvious . . . that extended comment" in his brief is unnecessary [PWC 11]. Had he in fact so commented, we might be able to discern the "obvious violation." However, as matters stand, the only hint of a due process claim (other than *Hammond Packing*) is petitioner's assertion that the court's discovery order did not expressly advise Kramer that his continued failure to produce documents would result in the imposition of his default. Once again, this argument was not made in the courts below, nor does it raise a due process issue in this case because the default against petitioner was not exclusively, or even primarily, premised on his failure to produce documents. Rather, it was entered because of his failure to identify, in a verified pleading, the documents in his possession.

Second, only the most strained interpretation of the facts would even arguably support petitioner's claim of inadequate notice. Until he filed his petition with the California Supreme Court, petitioner accepted as given that the discovery order provided explicit notice that a terminating sanction would be entered for his failure to identify *and* produce documents. In his appellate brief, he set forth the text of the order as providing:

> 5. If Kramer does not comply with the first and *third* parts of this order, this court will enter a terminating sanction which shall be the entry of a default judgment against Kramer [AOB 4].

The first part of the order required identification of the documents Kramer would produce. The *third* part required production of all such documents no later than April 8, 1988 [CT 121-122]. No argument was made to the California Court of Appeal, or earlier in the trial court, that the discovery order afforded inadequate notice of the circumstances which would lead to the entry of a default.

Only after the appellate court affirmed the default judgment did petitioner attempt to create a federal constitutional issue out of a transcription error in the original version of the discovery order which mistakenly provided for a default sanction in case of Kramer's failure to comply with the "first and *second*" parts of the order. As the second part of the order imposed no requirements on Kramer, but merely provided that he had not waived any objections to Ravella's requests by failing to respond earlier, it was apparent that the reference to the "second" part was an error. Kramer never claimed that he was misled into thinking that he could ignore with impunity

the requirement to produce documents. His briefs in the courts below confirm that he was not misled.[2]

In all events, entry of a default would have been proper even if the discovery order had made no mention of a possible default. California Code of Civil Procedure § 2031 sets forth the range of permissible discovery sanctions, including judgment by default. There is no notification requirement provided by state law, nor is such notification typically given. Thus, the order in this case actually went beyond what was necessary as a matter of state procedure, let alone due process. No additional notification was required to preserve petitioner's due process rights. *See, e.g., Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1961) (holding that a court may dismiss a complaint for failure to prosecute "even without affording notice of its intention to do so").

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[2] Petitioner's argument also rests on the implicit premise that the reason Kramer did not produce documents in response to the court order compelling discovery was because he believed that his default would not be entered for failing to do so. That, of course, is precisely the cynical approach to discovery that led the state courts to sanction him for his calculated manipulation of the discovery process.

IV. CONCLUSION

For the foregoing reasons the petition should be denied.

Dated: June 10, 1991.

Respectfully submitted,

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